No. 2526

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HAMILTON TRUST COMPANY,
Complainant and Appellant,
and

CORNUCOPIA MINES COMPANY OF OREGON, et al.,
Respondents and Appellants,

vs.

JOHN L. BISHER, JR., by John L. Bisher, his Guardian *ad litem*,
Intervener and Appellee.

Brief on Behalf of Appellants.

Emmett Callahan and
Wood, Montague & Hunt,
Attorneys for Appellants.

A. E. KERN & CO., PRINTERS

No._____

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HAMILTON TRUST COMPANY,
Complainant and Appellant,
and

CORNUCOPIA MINES COMPANY OF OREGON, et al.,
Respondents and Appellants,

vs.

JOHN L. BISHER, JR., by John L. Bisher, his Guardian *ad litem*,
Intervener and Appellee.

Brief on Behalf of Appellants.

Emmett Callahan and
Wood, Montague & Hunt,
Attorneys for Appellants.

A. E. KERN & CO., PRINTERS

In the United States Circuit Court of Appeals.

HAMILTON TRUST COMPANY,
Complainant and Appellant,
and

CORNUCOPIA MINES COMPANY OF OREGON, et al.,
Respondents and Appellants,

vs.

JOHN L. BISHER, JR., by John L. Bisher, his Guardian *ad litem*,
Intervener and Appellee.

STATEMENT OF THE CASE.

On April, 1st, 1905, the Cornucopia Mines Company of Oregon, issued $300,000 in first mortgage bonds with interest at 6% per annum, interest payable semi-annually; to secure the bonds it made and executed a first mortgage upon the mines and property fully described in the complaint herein, and named the Hamilton Trust Company of Brooklyn, New York, as the trustee in said mortgage bonds.

The bonds were sold on the open market and purchased by various buyers to the full amount issued at par value; when the bonds become due and payable by their terms (April 1st, 1911) the Mines Company, made default in the payment of the principal sum ($300,000.00) and defaulted in interest payments on the bonds in the sum of $99,000.00.

On December 5th, 1911, the Hamilton Trust Company, Trustee, filed its bill in foreclosure to fore-

close the mortgage bonds against the Mines Company and other Respondents, in its suit; on December 5th, 1911, personal service was had on the Mines Company; the other respondents were served personally on the 5th and 14th days of December, 1911, respectively.

Complainant on the 7th day of December, 1911, moved the Court for the appointment of a Receiver; thereupon the Court made its order to show cause why a Receiver should not be appointed on the 21st day of December, 1911; there being no objection to the appointment of a Receiver, the Court appointed Robert M. Betts receiver for the real and personal property of the Mines Company, described in Complainants' Bill, on said 21st day of December, 1911; on January 2nd, 1912, said Betts qualified as such receiver.

The Mines Company on January 22nd, 1912, filed its demurrer to the Bill of Complaint, which demurrer was by the Court on the 5th day of January, 1912, overruled; the Mines Company refused to plead further, whereupon the Court decreed that the Bill be taken as confessed against the Mines Company, and that a decree of foreclosure be entered against the Mines Company, as a first Mortgage lien against the property of the Mines Company in favor of Complainant, and for all equitable relief as prayed for in the Bill.

On April 30th, 1912, a final decree was made and entered in favor of the Hamilton Trust Cmpany, complainant, against the Mines Company and the

other defendants foreclosing the property of the mines as a first lien thereon, and ordering that same be sold by a Special Master on the 29th day of June, 1912.

The decree provided that the Hamilton Trust Company have and recover the sum of $422,940.00 and costs against the Mines Company; and that the purchaser at the sale of the mortgaged property be entitled to use and apply in making payment of the purchase price any of the outstanding bonds secured by the mortgage set forth in the decree, and that a sufficient amount in cash be paid to cover cost of sale, expenses of receivership, attorneys' fees, taxes, etc.

The sale took place as provided by the decree on the 29th day of June, 1912, and the mortgaged premises were sold by the Master to C. E. S. Wood, as trustee for the bondholders, for the sum of $432,000; that Wood as such trustee delivered over to the Master making the said sale the first mortgage bonds described in the complaint, amounting to the sums of $300,000 principal and $136,000 interest, or the total sum of $436,000; that the Master making the sale received the said bonds and interest coupons attached to same as the full purchase price bid by Wood as Trustee, and as liquidation in full of the mortgage indebtedness of the Mines Company, and issued a certificate of sale for the mortgaged property to Wood as Trustee on the 29th day of June, 1912, the day of sale.

That the Master cancelled the mortgage bonds in the sum of $300,000, and $136,000 interest coupons thereon, and delivered the same to the Mines Company as provided by the order and decree of the Court.

That on the 5th day of July, 1912, the Special Master made his report of the sale to the Court making the decree.

That on the 6th day of August, 1912, complainant made and filed its motion for confirmation of sale; that thereupon on the foregoing date the Court confirmed and approved the sale.

That on the 30th day of August, 1912 Robert M. Betts filed his final report as LESSEE and RECEIVER of the Cornucopia Mines Company of Oregon, showing a deficit of $781.81 in the operation of the mines during his leaseship and receivership.

That on the 10th day of October, 1912, John L. Bisher, Jr., filed his affidavit herein praying the Court to appoint John L. Bisher, Sr., as his guardian ad litem.

That thereupon the Court appointed John L. Bisher, Sr., as such guardian.

That on the 7th day of October, 1912, Ed. Rand, as Special Master, after confirmation of sale as made by him as such to C. E. S. Wood, Trustee, made a deed of conveyance of all the property described in complainants Bill and Notice of Sale to C. E. S. Wood, Trustee; that thereafter on October 8th, 1912,

C. E. S. Wood, Trustee, made a deed of conveyance of all the foregoing described property to the CORNUCOPIA MINES COMPANY OF NEW YORK, a corporation.

That on October 12th, 1912, John L. Bisher, Sr., for his minor son (the Intervener herein), commenced an action for damages to said minor son against Robert M. Betts, as Receiver of Cornucopia Mines Company of Oregon, in the above entitled Court; that said cause was tried in said Court, and on the 11th day of April, 1913, and a judgment was obtained by the Intervener herein against Betts as Receiver of the Mines Company of Oregon, for the sum of $12,500.

That afterwards on the 14th day of May, 1913, John L. Bisher, Jr., by his Guardian, filed a petition in intervention herein; that afterwards on the 29th day of May, 1913, the Mines Company of Oregon filed its special motion to dismiss the petition in Intervention.

That on the 29th day of May, 1913, the motion of the Mines Company to dismiss the petition in intervention was by the Court denied.

On June 20th, 1913, the Mines Company filed its answer to show cause in intervention; that thereafter on December 12th, 1913, John L. Bisher, Jr., by his Guardian, moved the Court to strike out the Mines Company's answer; thereafter on the 22nd day of December, 1913, the Court held the answer of the Mines Company, and the Hamilton Trust Com-

panys' insufficient to show cause: To the making and granting of such order and holding the Hamilton Trust Company, and Robert M. Betts, Receiver for the Mines Company, then and there duly excepted, which exception was duly allowed by the Court.

On the 8th day of June, 1914, John L. Bisher, Jr., by his Guardian, filed a motion to vacate and set aside the sale of the property, described in the Bill of Complaint, to C. E. S. Wood, Trustee, and to have the property resold and the proceeds of the sale applied, first, to the expenses of the sale of said property; and second, to expenses of the receivership, including the amount of the judgment rendered on April 11th, 1913, in the U. S. District Court in favor of John L. Bisher, Jr., by his Guardian, against Robert M. Betts, as receiver of Cornucopia Mines Company of Oregon.

That on the 15th day of June, 1914, the United States District Court for Oregon, by a final decree prayed for by the Intervener (John L. Bisher, Jr., by his Guardian), herein set aside the decree and order of sale theretofore made by the said Court on April 30th, 1912, in the foreclosure suit of the Hamilton Trust Company, Complainant v. Cornucopia Mines Company of Oregon, et al., and its decree so made on the 15th day of June, 1914, ordered all the property described in the Hamilton Trust Company's foreclosure suit as aforesaid to be resold, and that a first lien thereon was made and declared in favor of the Intervener, John L. Bisher, Jr., by his guardian, v. Robert M. Betts, Receiver of Cornucopia Mines

Company; in which action said Bisher recovered a judgment for the sum of $12,500.00, **on April 11th, 1913.**

That on the 30th day of July, 1914, the Hamilton Trust Company, complainant, v. the Cornucopia Mines Company of Oregon, et al., respondents, and John L. Bisher, Jr., by John L. Bisher, his Guardian ad liem, Intervener; the above named complainant and respondent, filed in the United States District Court for Oregon, their petition appealing from the foregoing decree made on June 15th, 1914, by said Court in favor of the said Bisher, as INTERVENER.

ASSIGNMENTS OF ERROR.

I.

The Court erred in permitting John L. Bisher, Jr., by John L. Bisher, his guardian ad litem to intervene herein, because the District Court of the United States for the District of Oregon, and the Judge thereof, had and have no jurisdiction, right or authority to permit said Bisher to intervene in the above entitled action, or of the matters, things or controversies involved therein, as the matters and things involved in said suit were fully and finally determined and closed by the final decree of this Court, by its decree made and signed on the 30th day of April, 1914; and the Court and Judge were without jurisdiction to make or grant the decree of this Court made and signed herein on July 10th, 1914.

II.

The Court erred in overruling and denying Complainant's motion to dismiss and disallow the petition in intervention filed herein by intervener on May 14th, 1913.

III.

The Court erred in sustaining and allowing the motion made and filed herein by intervener on the 12th day of December, 1913, dismissing and disallowing the answer of complainant filed herein on the 20th day of June, 1913; and said Judge exceeded his jurisdiction and erred in making an granting said order dismissing the Complainant's said answer, said order having been made and filed herein on December 22nd, 1913.

IV.

The Court erred in making a decree herein on the 10th day of July 1914, wherein it decreed and declared in favor of John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, for injuries sustained by said John L. Bisher, Jr., on the 29th day of July, 1912, evidenced by a judgment, costs, and accrued interest thereon, and such lien was declared to be and exist upon any and all of the property mentioned and described in a certain trust deed or mortgage of Complainants therein, and on any and all property thereafter acquired by said The Cornucopia Mines Company of Oregon or the said Robert M. Betts, Receiver thereof; and that for the payment of satisfaction of said judgment and lien all of the

said property was thereby seized, and any and all of said property was thereby declared to be subject to such judgment lien and such claim of the said John L. Bisher, guardian ad litem, and the said lien declared and decreed in said decree to be superior and prior in time and right to the said lien created by a certain trust deed or mortgage of Complainant therein, and on any property conveyed to or acquired by The Cornucopia Mines Company of Oregon after the execution of such trust deed or mortgage, and on any and all property conveyed to or acquired by the said Robert M. Betts as Receiver thereof; and that any purchaser or purchasers of said property or any part thereof, took their respective conveyances and acquired any title they may have thereto, subject to the superior and prior lien in right and time to the lien created by the said judgment in favor of John L. Bisher, guardian ad litem.

(Transcript of Record, pages 173 to 175.)

ARGUMENT AND LEGAL AUTHORITIES.

The fundamental question involved and to be presented in this appeal, as to the law and the facts in our judgment are neither complicated nor intricate.

The main question presented for determination and decision, is what amount of credit and faith is to be placed in and relied upon in the final judgments, DECREES and Orders of the Courts of this country, affecting the property rights of the citizens and corporations taking title to property under

the JUDGMENTS, DECREES and final process of courts of record.

The Appellant (Hamilton Trust Company) commenced its suit in foreclosure in the Circuit Court of the United States of Oregon, against the Cornucopia Mines Company of Oregon and all other persons interested or claiming any rights or interest by way of judgment, lien or otherwise in the property set out and described in the Bill of Complaint filed in said Court on the 12th day of December, 1911.

Personal service of process was had and made upon all of the respondents in that suit.

The Complainant in that suit, and Appellant herein, prosecuted its suit to final judgment and decree in strict conformity with the law, procedure and rules of the United States District Court; the property was duly advertised and sold as provided by the decree and order of sale as made by the Court on the 30th day of April, 1912.

The final decree provided among other things; that the Hamilton Trust Company, Complainant, have judgment and decree according to the prayer of its bill in the sum of $422,940.00, being the principal of said mortgage and interest as therein provided, and the further sum of $10,000 attorneys' fees, together with its costs and disbursements, and that in default of such payment by the Cornucopia Mines Company of Oregon, Respondent, or by some one on its behalf, that all of the mortgaged property described in the mortgage or deed of trust, or

which has been acquired by it or the said receiver, or which may hereafter be acquired prior to the sale herein ordered, shall be sold by or under the direction of Ed. Rand, Special Master of the Court for said purpose, as one property, and not separately, as hereafter directed, to satisfy the amounts due, and to become due, for principal and interest on the outstanding bonds and the several sums decreed to be paid, or so much thereof as the property will bring upon the sale thereof, and that Ed. Rand, as Master aforesaid, make such sale in accordance with the practice of this Court; AND THAT AT SUCH SALE THE COMPLAINANT, OR ANY OF THE HOLDERS OF SAID OUTSTANDING BONDS, MAY BECOME THE PURCHASER OR PURCHASERS AT SUCH SALE; and that all of the property ordered to be sold under this DECREE shall be sold at public sale to the highest bidder, between 9 o'clock in the morning and 4 o'clock in the evening, at the door of the Court House of Baker County, in the City of Baker, Oregon.

The decree further provided; that the Master give notice of the sale of the property by publication for six successive weeks in the Pine Valley Herald a weekly newspaper of general circulation in Baker County, Oregon, and that the same notice be published in a newspaper of general circulation for six successive weeks in at least one daily newspaper published in New York City, New York State; that said notices shall contain a statement of the time and place of sale, the terms of sale, and a brief gen-

eral description of the mortgaged property to be sold.

"And it is further ORDERED AND ADJUDGED AND DECREED THAT THE PURCHASER OR PURCHASERS OF SAID MORTGAGED PROPERTY AT SUCH SALE SHALL BE ENTITLED TO USE AND APPLY IN MAKING PAYMENT OF THE PURCHASE PRICE ANY OF THE OUTSTANDING BONDS SECURED BY SAID MORTGAGE AS HEREIN PROVIDED, but a sufficient portion of the purchase price shall be paid in cash to provide for payment of all costs and expenses incurred herein, and that the Master return the cash proceeds of said sale to the Clerk of this Court and that the same be paid to the Clerk of this Court and upon the completion and confirmation by this Court of the sale made under and in pursuance of this decree the said Clerk of this Court shall pay out such moneys as follows (Transcript of Record, pages 54 to 61 inclusive):

"1. The expenses of the sale of said property.

"2. The expenses of the receivership.

"3. The costs of this suit.

"4. Complainant's attorneys' fees.

"5. The taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.

"6. All amounts due or to become due upon the bonds secured by said mortgage, and in case such proceeds shall be insufficient to pay in full the whole amount of principal and interest so due and unpaid on such bonds, then the proceeds shall be applied

ratably upon the whole amount due according to the aggregate thereof without preference or priority of any part over any other part thereof.

"7. The remainder, if any, to respondent, The Cornucopia Mines Company of Oregon, its successors and assigns."

(Transcript of Record, pages 61-62.)

The final decree of April 30th, 1912, provided that upon the completion and confirmation of the sale of the Mines property at the Special Master's sale, which sale was made upon the 29th day of June 1912, that unless the property was redeemed as by law provided, that the Special Master should make and execute a fee simple deed to the purchaser of all the property sold at the said Master's sale. (Transcript of Record, page 62.)

No redemption was made of the property sold at the Master's sale as aforesaid;

The final decree in favor of the Hamilton Trust Company on foreclosure of the Mines Company's property, provided that Robert M. Betts, as Receiver, should also make and execute and deliver a good and sufficient deed of conveyance of any and all property of the Mines Company, or any interest therein, vested or standing in the name of the Receiver, or to which said Receiver has acquired any right, title or interest.

(Transcript of Record, page 63.)

That at the sale of the property on June 29th, 1912, C. E. S. Wood became the purchaser of all the

property of the Mines Company as Trustee for the bond-holders for the sum of $432,000.00. (Transcript of Record, page 66.)

On August 6th, 1912, R. S. Bean, as United States District Judge, confirmed the sale of the property sold by the Special Master to Wood as Trustee, and ordered Ed. Rand as such Special Master to convey by a Master's Deed to Wood, Trustee, all the properties described in Complainant's Bill (Hamilton Trust Company), and Master's notice of sale, on the expiration of the redemption period of sixty days from the date of confirmation of sale, the Special Master, on the 7th day of October, 1912, made and executed a Master deed as directed and ordered by the Court, to C. E. S. Wood, as Trustee for the bond-holders. And in the order of confirmation of sale the Court provided that C. E. S. Wood, Trustee, having delivered to the Master at the time of sale of the properties on the 29th day of June, 1912, first mortgage bonds of the Cornucopia Mines Company of Oregon, in the sum of $300,000.00, with accrued interest thereon in the sum of $136,000.00, that "C. E. S. Wood Trustee, ought to be and hereby is credited with any overplus between the amount of said bid and the value of the bonds and accrued interest surrendered, and 'if upon any future showing such credit between said respective parties becomes material.' " (Transcript of Record, page 73.)

Appellants would call the Court's attention to Sections 3, 4, 6 and 7, of the Report of Robert M. Betts, as Lessee and Receiver of the Mines Com-

pany. (Transcript of Record, pages 75 to 77 inclusive).

"3. That during the said receivership of said Cornucopia Mines Company of Oregon as aforesaid he held and operated said Mines under a written lease with said Cornucopia Mines Company from the first day of November, 1911, until the first day of November, 1912.

"4. That hereby submits this his final report of the operation of said mines under said lease and receivership to this Court.

"6. That all the property of every kind and character, real and personal, and all assets of Cornucopia Mines Company of Oregon, Respondent, were sold under a decree and order of this Court on the 29th day of June, 1912, by Ed. Rand, the Special Master of the District Court of the United States for the District of Oregon who was theretofore appointed by this Court as such Special Master, and before said sale as aforesaid he duly qualified as such Special Master; that at such Master's sale as aforesaid, said property, real and personal, was sold to C. E. S. Wood, as trustee, by said Ed. Rand, as Special Master of this Court, and said sale was afterwards by this Court duly confirmed.

"7. That there is no other property, real or personal, of said Cornucopia Mines Company of Oregon, Respondent, unsold or remaining to be administrated upon by said Receiver."

SALE OF MORTGAGED PREMISES UNDER DECREE.

There is no contention on the part of the Appellee but what the mines and power plant and other property were sold under a mortgage foreclosure under a decree and order of sale made by the United States District Court for Oregon, on the 30th day of April, 1912, in favor of the Hamilton Trust Company, Appellant herein, and against the Mines Company, and the other respondent named in the Bill of Foreclosure;

That the sale was made under the foregoing decree on the 29th day of June, 1912.

That the sale under the decree was made by the Special Master (Ed. Rand), of the District Court of the United States for the District of Oregon, who was theretofore appointed by that Court as such Special Master, and before the sale he duly qualified as such Special Master; that at such Master's sale as aforesaid, said property, real and personal, was sold to C. E. S. Wood, as Trustee by said Special Master of said Court, **and that such sale was afterwards duly confirmed by said Court in accordance with the law and rules of said United States District Court.**

The Court will note that the said foregoing sale was duly made just thirty days prior to the date of the alleged injury (July 28th, 1912) to the Intervener and Appellee herein.

By the statute of the State of Oregon, Section

252, Lord's Oregon laws, Vol. P. 269, it is provided that a purchaser at an execution sale, or sale under a decree of foreclosure, is entitled to immediate possession of the property at such sale.

Said section reads as follows:

"THE PURCHASER FROM THE DAY OF SALE, UNTIL A RE-SALE, OR A REDEMPTION, AND A REDEMPTION FROM THE DAY OF HIS REDEMPTION UNTIL ANOTHER REDEMPTION, SHALL BE ENTITLED TO THE POSSESSION OF THE PROPERTY PURCHASED OR REDEEMED, UNLESS THE SAME SHALL BE IN THE POSSESSION OF A TENANT HOLDING AN UNEXPIRED LEASE, AND IN SUCH CASE, SHALL BE ENTITLED TO RECEIVE FROM SUCH TENANT THE RENTS OR THE VALUE OF THE USE AND OCCUPATION THEREOF DURING THE SAME PERIOD."

The foregoing statute has been fully interpreted and passed upon by the Supreme Court of Oregon in:

Cartwright v. Savage, 5 Ore. 397.
Bank of British Columbia v. Harlow, 9 Ore. 388.
U. S. Mortgage Co. v. Willis, 41 Ore. 484.
Eldridge v. Hofer, 45 Ore. 243, 77 Pac. 874.
Gest v. Packwood, 39 Fed. 532.
Balfour v. Rodgers, 64 Fed. 927.

On and after the 29th day of June, 1912, when said mines and electric power plant were sold under the decree of foreclosure and order of sale by the

United States District Court, the purchaser thereat **immediately on the day of sale** took possession of said property under the decree and the foregoing statute, and from the day of sale by operation of law, and as a matter of law was in possession thereof; the purchasers title and ownership vesting therein from the date of sale as a matter of law.

The title of a purchaser at a judicial sale under a decree of foreclosure takes effect from the day of sale, and is paramount to and defeats any subsequent lien or incumbrance asserted by way of alleged damages for personal injury; the purchaser at a judicial sale takes a valid and unimpeachable title, and it cannot be successfully assailed except for fraud.

After the decree order of sale and notice of sale, and SALE, the premises so sold, cannot be withheld from the purchaser.

> Osterberg v. Union Trust Co., 93 U. S. 424, 428, 23 L. Ed. 964.
>
> Terrell v. Allison, 21 Wall. 289, 291, 22 L. Ed. 634.

The Intervener and Appellee attempts to assert a prior lien against the property of the Mines Company foreclosed by the Hamilton Trust Company, the Appellant upon a personal judgment for damages recovered against Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, for injuries alleged to have been suffered by him while an employee of said Receiver on the 28th day of July,

1912, in a suit filed in the United States District Court for Oregon, **on the 12th day of October, 1912,** a date prior to the sale of the property under the foreclosure suit of Hamilton Trust Company, Appellant, and prior to the confirmation of said sale.

To recapitulate, the decree made and entered in favor of Hamilton Trust Company, in foreclosing the mortgage against the Mines Company, dated April 30th, 1912, provided that the Master at the sale of the mortgaged premises which took place on June 29th, 1912 was by the said decree: "It is further ordered, adjudged and decreed that the purchaser or purchasers of said mortgaged property at such sale shall be entitled to use and apply in making payment of the purchase price any outstanding bonds secured by said mortgage as therein provided," but a sufficient portion of the purchase price shall be paid in cash to provide funds for payment of all costs and expenses incurred herein."

(Transcript of Record, page 61.)

That at the sale of the mortgaged property by the Special Master on the 29th day of June, 1912, C. E. S. Wood, as Trustee, became the purchaser thereat, and as part of the purchase price Wood, as Trustee, delivered over to Ed. Rand, as Special Master, 600 bonds of the par value of five hundred dollars each, or the total value of $300,000.00, and interest coupons attached to the foregoing bonds drawing 6% per annum in the sum of $136,000.00, and that the Special Master making said sale then and there accepted said bonds and accrued interest in full pay-

ment and satisfaction of the bid of Wood as Trustee on his bid of $432,000.00 at the said sale, and then and there declared said Wood, as Trustee, the purchaser of the property described in the decree and order of sale of April 30th, 1912.

That at said sale C. E. S. Wood, as Trustee, paid in cash, besides the bonds of the value of $300,000.00 and the $136,000.00 accrued interest thereon:

1. The expenses of the sale of said property.
2. The costs of the suit.
3. Complainant's attorneys' fees.
4. That there were no expenses at the date of said sale (June 29th, 1912), of the receivership therein, nor taxes or other expenses incurred at said foregoing date.

We refer the Court to the Report of C. E. S. Wood, as Trustee, in his report to the United States District Court for Oregon, found on pages 245, 246 and 247, Transcript of Record.

REPORT OF TRUSTEE.

To the Honorable Charles E. Wolverton United States District Judge:

Comes now C. E. S. Wood, one of the attorneys for the Hamilton Trust Company, complainant herein, and at the suggestion of the Court, informs the Court:

That he attended the sale held and conducted by Ed. Rand, a Special Master duly appointed by this Court, under the decree of this Court dated the 30th day of April, 1912, wherein said Special Master was ordered to sell the real and personal property described in said decree.

That said Special Master of this Court after full compliance with the orders and directions of said decree of this Court made on the said 30th day of April, 1912, offered said real and personal property described in said decree for sale on the 29th day of June, 1912, in front of the Court House in Baker City, Baker County, Oregon, to the highest bidder thereat.

That at said sale as aforesaid, I, C. E. S. Wood, as Trustee· became the purchaser of said described real and personal property, for the sum of $432,-000.00, and delivered to said Special Master of this Court the first mortgage bonds in the sum of $300,-000.00, and accrued interest on said bonds in the sum of $136,000.00, as provided and decreed by this Court in its said decree of April 30, 1912, in the above entitled suit; and that in addition to the payment of the foregoing sums, I paid cash expenses of said sale of said property in full to date of sale; the costs of this suit and complainants' attorney's fees in full.

That on the date of said sale of said property, the 29th day of June, 1912, there were no expenses of the receivership of said property nor taxes nor other expenses incurred in the care, custody or receivership of the property sold as aforesaid to me as Trus-

tee at the date of sale thereof, to-wit, the 29th day of June, 1912.

C. E. S. WOOD,
Trustee.

Ed. Rand the Special Master that made the sale of the properties, on July 5th, 1912, made a report to the United States District Court for Oregon, of the sale, and in that report of sale he set out the following: "I further report that I have delivered to said C. E. S. Wood, Trustee, a copy of this report, duly signed by me, as A CERTIFICATE OF SALE, and that I hold said bonds to be returned into the registry of this Court, or otherwise, as the Court may direct, to be canceled, and as so canceled, to be re-delivered to the Respondent, The Cornucopia Mines Company of Oregon, as the purchase price paid by the purchaser, C. E. S. Wood Trustee, for said properties, and as liquidation of the indebtedness of said, the Cornucopia Mines Company of Oregon."
(Transcript of Record, page 67.)

In the decree made in favor of the Intervener and Appellee (Bisher), by the United States District Court for Oregon, on July 10th, 1914, by which decree said United States District Court set aside and vacated and ordered a re-sale of the property theretofore by its former decree and order of sale, dated April 30th, 1912, in favor of the Hamilton Trust Company, in its foreclosure suit against the CORNUCOPIA MINES COMPANY OF OREGON; Judge Wolverton, in the decree and order of sale

of July 10th, 1914, gave the following reason for vacating and setting aside the said decree and sale:

"COURT: That is the very reason why this Court is inclined to allow this procedure by which an execution may go against this property for a resale. The order of the Court provided, when the sale was made that the purchaser might pay in bonds, but the expenses and costs of the sale, and, by my rendition of the order of sale, the expenses and costs of the receivership should first be paid. The purchaser has not complied with that order. The purchaser has not paid the costs of the receivership, which I think to be legitimate costs, including this demand. And I think there ought to be a report made as to what was done in that respect, and what money was paid into Court, and why this other money was not paid."

(Transcript of Record, page 212.)

The Cornucopia Mines went into the hands of a receiver.

While the property was under operation by the receiver a man was injured; an employee of said receiver. The injury occurred in the interim between sale by the receiver and the confirmation thereof. The action for personal injuries was not instituted until after the order of confirmation had been taken. The question arises whether the plaintiff's remedy is against the fund realized at the sale or against the property itself.

The question arises, when does the receiver's liability for damages for personal injuries sustained

during the receivership cease; in the present case Appellants' however, insist that the personal injuries alleged by the Appellee and Intervener herein did not occur during the receivership; the property under the receivership was sold on June 29th, 1912, and the alleged injury did not occur until July 28th, 1912.

Where the decree and order of sale clearly provides and directs that the property shall pass subject to all indebtedness incurred by and under the receivership, the purchaser at the sale would be put on his notice and would be charged with any liens or claims against the property.

Farmers' Loan & Trust Co. v. Central R. Co. of Iowa, 17 Fed. 758.

A judgment against a receiver, recovered after a sale of the property under the receivership, which at the time of sale was not charged with an existing lien or indebtedness incurred during the receivership, and after the receiver had submitted his accounts does not give or create a lien on the property that was subject to the receivership.

Peterson White v. The Koekuk & Des Moines R. Co., 2 N. W. 556.

Under all the authorities that we have been able to find after diligent search, the liability of a receiver or the purchaser at a judicial sale depends wholly upon the provisions of the decree and order of sale.

There is no suggestion in the decree and order

of sale in this case, that the purchaser at the sale of the property sold under the mortgage foreclosure on June 29th, 1912, purchased or took the property CUM ONERE as to a personal injury alleged to have occurred on July 28th, 1912, or thirty days after the property under the receivership was sold at the Master's sale.

> "The rights and liabilities of a purchaser at a judicial sale are measured by the terms and conditions of the decree. If the decree directs a sale subject to liens established or to be established or subject to debts and liabilities incurred by a receiver in the management of the property, the purchaser at the sale takes the property cum onere, and liability in the hands of the purchaser, or his assignee."

In this case the money secured by the Receiver at the sale had been exhausted in the payment of other claims against the Receiver before the claim of the Appellee had been in existence, or the personal injury upon which the lien was predicated occurred as adjudicated by the Court. The sale had in all things complied with the directions of the Court and decree and the conditions met with by the purchaser. On the question of whether or not the Court after confirmation could impose further conditions the Court said:

> "We are at a loss to understand upon what principle the Court can, in such case, after confirmation of the sale, and the performance of the conditions of sale, decree a further condition which in substance, enhances the price to

be paid for the property. If the Court had authority to compel the purchaser to pay one thousand dollars in addition to the price bid, it might, with equal propriety, when circumstances demanded, compel him to pay a hundred thousand dollars. The sale, when confirmed by the Court, and its conditions met by the purchaser, created in effect, a contract between the Court and the purchaser, and the Court could no more impose an additional term or condition upon that contract than could an individual."

"The appellee acquired by his award no lien upon the property. The award would be imposed as an equitable lien upon any fund in the hands of the Receiver, but there was, at the passing of the decree no such fund. It had previously been exhausted in the discharge of other obligations. We see no propriety in imposing the burden of the payment of the appellee's claim upon the appellant. It might, we think, with equal propriety be imposed upon a stranger to the record."

Facts very similar to those under consideration arose in the case of Farmers' L. T. Co. v. Central R. of Iowa, 7 Fed. 537-542. This case arose upon the consideration by the Court of a motion to rescind an order made theretofore by the Court granting one certain Mahala Clear, as next friend to rescind an order made theretofore by the Court granting one certain Mahala Clear, as next friend of Edward Sloan, to sue H. L. Morrill, late Receiver of the Central R. Company of Iowa for personal in-

juries received by said Sloan during the receivership of said Morrill.

The order granting leave was made after Morrill had been discharged and subsequent to the final decree by which the railroad property and all its funds had been turned over to the purchaser.

The Court in considering the motion said at page 538:

> "This motion raises a very difficult and embarrassing question. It is this: When, in a foreclosure suit, a Receiver appointed by the Court has been discharged, and the property by the Court, turned over to the purchaser, how are unsatisfied claims against the Receiver, upon torts committed and contracts made by him, to be prosecuted and satisfied? Who are to be made defendants to actions upon such claims? How are such cases to be tried?
>
> * * * * * * * *
>
> "What would be the remedy of the claimant if the Court should discharge the receiver and place the fund or property beyond its control by turning it over, without reservation to a purchaser?

Answering the last question the Court goes on to say:

> "I confess that if the fund or property should be turned over to a purchaser without reservation, I am at a loss to see what the remedy of the claimant would be—as for example, the old railroad company—in this case. How could he found a personal action of tort

> or contract against a party who would be a stranger to the tort or contract? How could he count upon or prove the tort or contract against a party who never committed the one nor made the other?

It will be noted that again in the foregoing case the principle that the decree is the source of the right to hold the fund or the purchaser, respectively, appears.

It is undoubtedly true as a matter of law and procedure that the terms of the decree and order of sale, and the decree of confirmation constitute the contract of purchase, and that, therefore, it was not within the power of the Court to impose further terms, or to declare a lien upon the property not provided for and contemplated by the final decree of foreclosure of April 30th, 1912, and the confirmation of sale.

> Railroad Co. v. McCammon, 18 U. S. App. 628, 10 C. C. A. 50, and 61 Fed. 772; 18 U. S. App. 709.

PRIORITY MORTGAGE LIENS.

We take it that the attorneys' for Appellee are too sound lawyers to seriously contend that had the mines been operated by the owners instead of by the Receiver that Appellee and and Intervener would have had a first and prior lien for personal injuries against the first mortgage bond holders.

Ex parte Brown, 15 S. C., 518, the case of Davenport v. Alabama & C. R. Co., supra, in which case the Court said it was regarded as too clear for argument that if the road had been run by the president and directors when the injury was sustained, such a claim could not possibly have priority; but the Receivers act merely in the place of the president and directors, except so far as the Court may otherwise direct. A Receiver is merely substituted for a corporation or concern; the Receiver is appointed to represent, in law, the interest of the insolvent institution. That with the exception of debts for taxes and Receiver's certificates issued to pay taxes to keep the institution going there could be no priority or preference among debts and claims for damages allowed precedence over first mortgage bonds, notwithstanding certain orders made by the Court below. Union Trust Company of New York v. Illinois Midland Railway Co. et al, 117 U. S., 434· 29 L. Ed., page 963.

The only exception to the foregoing rule and authority are in those class of cases where the claim for damages for personal injuries on railroads operated by a receiver, has been held to have priority out of the fund realized from the earnings in preference to a mortgage, but in any event not out of the corpus (15 S. C. 518.) Klein v. Jewett, 26 N. J. Eq. 474; Texas P. R. Co. v. Overheiser, 76 Tex. 437, 138 W. 468; Texas P. R. Co. v. Johnson, 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; Texas & P. R. Co. v. Miller, 79 Tex. 78, 11 L. R. A. 395, 23 Am. St. Rep.

308, 15 S. W. 264; Texas & P. R. Co. v. Geiger, 79 Tex. 13, 15 S. W. 214; Texas P. R. Co. v. Griffin, 76 Tex. 441' 13 S. W. Tex. 471; Texas & P. R. Co. v. Comstock 83, Tex. 537, 18 S. W. 946.

It seems to be well established in the operation of railroads under receiverships that personal injuries to employees are considered part of the operating expenses and are entitled to payment as such out of the earnings of the property, but can not be satisfied out of the corpus of the property. Claims for personal damages are paid out of the net income if that is sufficient, but they have no priority in law over the first mortgage indebtedness or other existing liens, judgments or indebtedness existing when the action is brought in which the receiver was appointed, 41 L. R. A., N. S., pages 700 and 702; Pennsylvania Steel Co. v. New York City Railway Co., 165 Fed. 457; St. Louis Trust Company v. Riley, 30th L. R. A. 456, 16 C. C. A. 610, 36 U. S. App. 100, 70 Fed. 32. Guaranty Trust Co. v. Metropolitan Street R. Co., 18 Fed. 637.

In the case of White v. K. & D. M. R. Co., 2 N. W. Rep 1016, the plaintiff received certain injuries in the operation of the railroad in the hands of a special receiver pending the foreclosure of first mortgage bonds, in which action he recovered a judgment against such receiver; the Court held that such claim for personal damages did not stand on the footing of expenses of the receivership after the receiver had made his accounting and created no lien in equity, or otherwise, that could be enforced against

the corpus, and that the purchaser at the foreclosure sale was in no wise liable for the judgment for personal damages and that the purchaser took the property at the sale clear and unincumbered of all claims and liens other than for taxes and costs.

In this case "it is contended that the claim of the Appellee (Intervener herein) for injuries was an equitable lien prior to the mortgage liens upon the railway property and franchises, which were in the hands of a receiver at the time of the injury, and that the claim stands upon the "precise" footing of claims against the receiver arising during his receivership for labor and supplies during his operation of the road." The Court said in its opinion: "This position is not tenable. It is true the first mortgage provided that the expense of the trust should be first borne by the mortgaged property. The expense of the trust could, by no possible rule of construction, be held to include claims for personal injuries arising while the trust deed was in process of foreclosure, and the road in the hands of a receiver. The decree authorized the rceiver to pay the current expenses of operating the road, and to be used in operating the same. Now, what is meant by an equitable lien, for the injury complained of is difficult of comprehension. Liens for personal injuries sustained by the employees of railroad companies are created by statute in this state (a claim for personal injuries in the case of the Appellee, and the Intervener in this action, is founded and predicated upon the Employers' Liability Law of Ore-

gon), and claims of this character only become liens when reduced to judgment. It is possible, if the plaintiff had recovered his judgment before the Receiver was discharged and the Receiver had paid the judgment he would have been allowed to deduct the same from the funds in his hands, but an action against the purchaser of the road to establish a judgment as a lien as against the property purchased at a sheriff's sale is quite another thing. Second in this case, it is insisted that the road and property purchased by a committee of the bond holders should be charged with the payment of the judgment, because the Receiver was the agent and receiver of the mortgagees and was operating the road for the benefit of the mortgagees when the plaintiff was injured. This position can not be maintained, the Receiver was the agent of the Court. The property was in the custody of the law. His possession is the possession of the Court for the benefit of whoever may ultimately be determined to be entitled to its possession. High on Receivers, Sec. 134, Wishall v. Sampson, 14th Howard, 61.

The Court further said: "It seems to us if a judgment against a receiver for an injury by reason of the negligence of his employees is a lien upon anything, it must be upon the earnings of the road which may be in his hands by virtue of his appointment as receiver, and WE KNOW OF NO CASE WHERE ANY OTHER OR DIFFERENT RULE HAS BEEN ADOPTED. No doubt the Court, which appoints and controls a receiver, has a right

to provide for the payment of all just claims arising out of the operation of a road by a receiver, and we believe the uniform practice is to allow claims to be paid out of the funds in the receiver's hands, BUT NO CASE HAS COME TO OUR NOTICE where it has been held that the purchaser of a railroad and franchises takes the property charged with claims for personal injury which occurred while it was in the hands of a receiver, and before the title passed to the purchaser. On the contrary, in Berry v. B., C. R. & N. P. supra, it is held that the purchaser takes the property free from any claims or causes of action of this character."

In the case of Chicago & O. R. R. Co. v. McCammon, 61 Fed. 772, was a case where a receiver was appointed to operate a railroad pending the foreclosure of first mortgage bonds. The Court entered a decree in the case foreclosing the bonds wherein it was directed that the property be sold to satisfy the mortgage. The property was bid in and payment made in the first mortgage bonds and part in cash, substantially as provided in this case, THE SALE WAS MADE AND AFTERWARDS CONFIRMED, AND THE COURT AFTERWARDS, ON A MOTION IN INTERVENTION, HELD THAT THE COURT HAD NO POWER TO DIRECT A PURCHASER AT A MORTGAGE SALE TO PAY A CLAIM WHICH HAD BEEN ADJUDICATED AGAINST A RECEIVER AFTER THE CONFIRMATION OF THE SALE; this case presents the similar facts that the Appellee

and Intervener herein is attempting to subject the corpus to the satisfaction of a judgment procured by him long subsequent to the sale of the property and the confirmation thereof to the Appellant herein. The Court in denying the right of the petitioner and intervener to subject the mortgaged property under the receivership in the foregoing suit to the payment of intervener's claim, said that "THE RIGHTS AND LIABILITIES OF A PURCHASER AT A JUDICIAL SALE ARE MEASURED BY THE TERMS AND CONDITIONS OF THE DECREE. If the decree directs the sale subject to liens established, or to be established, or subject to debts and liabilities incurred by the Receiver in the management of the property, the purchaser at the sale takes the property cum onere, and liability for the claims so reserved by the decree follows the property in the hands of the purchaser, or his assignees. The liability of the Appellant for a claim with which it has been charged must therefore depend upon the terms of the decree of November 1885." "It is clear that the property was directed to be sold discharged of all liens and claims." * * * There is no suggestion in the decree in this case that the mines property was to be sold subject to any lien whatever except the cost of the sale and attorneys' fees, etc.

"The difficulty attending the payment of the Appellee's recovery for damages arising from the fact that the fund obtained by the sale was insufficient, having been absorbed in the payment of other claims against the Receiver before the claim of the

Appellee had been adjudged by the Court. The sale would seem to have been in exact accordance with the directions of the Court to have been confirmed by the Court and the conditions of the sale to have been fully met by the purchaser. WE ARE AT A LOSS TO UNDERSTAND UPON WHAT PRINCIPLE THE COURT CAN, IN SUCH CASE, AFTER CONFIRMATION OF A SALE, AND THE PERFORMANCE OF THE CONDITIONS OF THE SALE, DECREE A FURTHER CONDITION, WHICH, IN SUBSTANCE, ENHANCES THE PRICE TO BE PAID FOR THE PROPERTY. IF THE COURT HAD AUTHORITY TO COMPELL A PURCHASER TO PAY ONE THOUSAND DOLLARS IN ADDITION TO THE PRICE BID, IT MIGHT, WITH EQUAL PROPRIETY, WHEN CIRCUMSTANCES DEMANDED, COMPELL HIM TO PAY ONE HUNDRED THOUSAND DOLLARS. THE SALE, WHEN CONFIRMED BY THE COURT, AND ITS CONDITIONS MET BY THE PURCHASEER, CREATED, IN FACT, A CONTRACT BETWEEN THE COURT AND THE PURCHASER, AND THE COURT COULD NO MORE IMPRESS A CONDITION OR TERM UPON THAT CONTRACT THAN AN INDIVIDUAL. Farmer's Loan & Trust Co. v. Central R. of Iowa, 7 Fed. 537; Davis v. Duncan 19 Fed. 477. The Appellee, cleared by his award, takes no lien upon the property. The award would be imposed upon an equitable lien upon any fund in the hands of the Receiver, but there was,

at the passing of the decree, no such fund. It had been previously exhausted in the discharge of the other obligations. We see no propriety in imposing the burden of the payment of the Appellee's claim upon the Appellant. IT MIGHT, WE THINK, WITH EQUAL PROPRIETY, BE IMPOSED UPON A STRANGER TO THE RECORD. THE DECREE WAS ALLOWED BY THE COURT IN MIS-CONCEPTION OF THE TERMS OF THE FORECLOSURE DECREE."

PRIORITY OF LIENS.

A judgment in a negligence case was held not entitled to priority out of funds in the hands of a receiver appointed in a mortgage foreclosure before the mortgage was paid. Farmer's Loan & T. Co. v. Detroit, B. C. & A. R. Co., 71 Fed. 29; Farmer's Loan & T. Co. v. Northern P. R. Co., 74 Fed. 431, 71 Fed. 245.

In the discussion in this case the Court referred to the case of Fosdick v. Schall, 99 U. S. 252, 25 L. Ed. 342, and said: "This, however, affords no warrant for the contention that all the liabilities incurred by a railroad company in the operation of its road before a mortgagee demands possession, or before the appointment of a receiver, are to be rated in the catagory of current debts and expenses entitled to preference over the claims of the bond holders. As elsewhere said in the case just cited the expense and debts which are held prior in equity to the mortgagee's debt are outstanding debts for labor,

supplies, equipment, or permanent improvement of the mortgaged property. There is nothing in that case, nor in the subsequent decisions of the Court, extending this preference to other classes of claims." So, the claims against a railroad for causing death is not entitled to priority against a fund in the hands of a receiver as against a mortgage, as there was no diversion in this case, and as said in the Farmer's Loan & T. Co. v. Green Bay W. & St. P. R. Co., 45 Fed. 664, there can not be a restoration without a diversion.

Central Trust Co. v. East Tennessee V. & G. R. Co., 34 Fed. 895; Ames v. Union P. R. Co., 74 Fed. 335; St. Louis Trust Co. v. Riley, 30 L. R. A. 456; 16 C. C. A. 610, 36 U. S. App. 100, 70 Fed. 32; Foreman v. Central Trust Co., 18 C. C. A. 321, 30 U. S. App. 653, 71 Fed. 776.

A first mortgage given in good faith and duly recorded is prior, superior and paramount to a judgment for personal injuries subsequently occuring. Coe v. New Jersey M. R. Co., 31 N. J. Eq. 127.

Then in summarizing the principles which underlie this subject of priorities, it may be said that if the premises are already incumbered by a first mortgage to a bona fide incumberancer, the claim of a mechanic for personal injury is subordinate to that of the mortgagee; the greater weight of authorities seem to recognize this as the law covering the subject. Munger v. Curtis, 42 Hun. 465.

However, from Appellant's contention it is not necessary that it should urge or stand upon the

foregoing authorities as the Receiver was not in possession or operating the property upon which the alleged injury took place on the 28th day of July, 1912, as the property was then in the hands of C. E. S. Wood, Trustee, as purchaser under the sale that took place on June 29, 1912.

Union Trust Co. of New York v. Illinois Midland Railway Co. et al, 117 U. S., L. Ed. 963. A distinction exists between a private corporation and a railroad corporation that should be distinguished in the discussion of a law as to priorities over mortgages. A railroad corporation is a quasi public institution, charged with the duty of operating its road as a public highway. If for any reason a railroad becomes embarrassed and unable to perform its public duty, the Courts, pending proceedings for the sale of the road, will operate it by a receiver, and make the expense incident thereto as a first lien on the theory of the larger duty that it owes the public. This is done on account of the peculiar character of the property. Railroads are generally mortgaged to secure bonds, and the public who invests in such securities have knowledge and notice that railroad securities rest upon mortgaged property. Private corporations, however, owe no duty to the public, except to observe the law as an individual is obligated to do. Generally the operation of a private corporation is not a matter of public concern. And the decisions of the Supreme Court of the United States are uniformly in line in sustaining orders giving priority to liens by way of receivers' certifi-

cates or mechanics' liens for personal injuries in cases of railroad receiverships, and in relation to private corporations for which receivers have been appointed having no application to mortgages executed by a private corporation.

Fosdick v. Schall, 99 U. S. 235, 25 L. Ed., 339; Barton v. Barber, 104 U. S. 126, 26 L. Ed. 672; Miltenberger v. Logansport C. & S. W. R. Co., 106 U. S. 286, 27 L. Ed., 117; Union Trust Co. v. Illinois M. R. Co., 117 U. S., 434, 29 L. Ed. 963; Wood v. Guaranty Trust S. D. Co., 128 U. S. 421, 32 L. Ed. 472; Neeland v. American Loan & Trust Co. of Boston, 136 U. S. 89, 34 L. Ed. 379; Morgan's L. & T. R. & S. S. Co. v. Texas Central R. Co., 137 U. S. 171, 34 L. Ed. 625.

In the case of Wood v. Guaranty Trust & S. D. Co., the Supreme Court of the United States said: "The doctrine of Fosdick v. Schall has never yet been applied in any case excepting that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern."

In the case of St. Louis Trust Co. v. Riley, by next friend, 70 Fed. Rep. 32. This was an action on the part of Riley to recover damages against the Trust Company while he was engaged as a motorman in the operation of an electric car. The property was being operated by a Receiver appointed, as in the case at issue, for the foreclosure of a mort-

gage. Riley recovered a judgment for $5,000 in his action for damages against the Trust Company et al. On an intervening petition in the foreclosure suit the Court below held that the claim of Riley, the appellee, upon the earnings of the property of the railway company during the receivership was superior to that of the mortgages and directed the Receiver to pay it in preference to the mortgage debts. From this decision of the lower Court and order error was assigned and appeal perfected. The counsel for Riley, appellee, argued in that case that damages for the negligence of a railroad company are the necessary expense of operation of a railroad and rested his contention chiefly upon the decision in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, but the Court said: A claim for damages for the negligence of a mortgagor lacks the indispensable element of a preferential claim. It is not based upon any consideration that inures to the benefit of the mortgaged security. Wages, traffic balances and supplies produce an increased income and preserve the mortgaged property. Repairs and improvements increase the value of the security of the bondholders. But the negligence of a mortgagor neither produce an income or enhance the value of the property; that damages for negligence occur in violation of that contract; the negligence that is the foundation of this claim did not tend to keep the railroad in operation, but if repeated and continued would inevitably stop it, it was not necessary but was deleterious, in its operation. The Court said that "for these reasons this claim for damages can not, in our opinion, be

allowed a preference over a mortgage debt in payment out of the income earned by the receivers appointed under the bills for the foreclosure of these mortgages."

AS TO THE RIGHTS AND LIABILITIES OF A PURCHASER AT A JUDICIAL SALE; ARE MEASURED BY THE TERMS AND CONDITIONS OF THE DECREE.

Chicago & O. R. R. Co. v. McCammon, C. C. of App. 61 Fed. Rep.; Continental Trust Co. of New York v. American Security Co., C. C. of App. 80 Fed. Rep.

AS TO THE LIENS OF A MORTGAGE ON AFTER ACQUIRED PROPERTY.

The mortgage foreclosed by Appellant's Bill in this suit provided that after acquired property, and all improvements thereafter placed upon the same, was to become part of the mortgaged property under the mortgage given. The mortgage provided: "33. The buildings, structures, erections and constructions, and all improvements now or hereafter placed upon any of the hereinbefore described property with their fixtures" * * * "above conveyed and transferred, or intended so to be, now held or hereafter acquired, shall be decreed real estate for all the purposes of this indenture (mortgage) and shall be held and taken to be fixtures and appurtenances of said Cornucopia Mines and part thereof and are to be used, and in case of a sale thereunder, are to be sold therewith." (Transcript of Record, pages 20 and 21.) See note to Pennock v. Coe, 64 U. S., L. Ed. 436.

The first case adjudicated by the Supreme Court of the United States and which fully considered and discussed the question of the power of a Court of Equity to make preferences in suits to foreclose mortgages, was in the leading case of Fosdick v. Schall, 99 U. S. 253, 25 L. Ed., 342. In that case the Court rendered a unanimous judgment which was delivered by Chief Justice Waite, and the opinion rendered in that case is the foundation of the doctrine of preference and priorities in the Federal Courts, and there is no case prior to that judgment in the Federal Courts that has any application to the doctrine; of this fact Appellants have fully advised themselves by a complete and exhaustive research of all the authorities.

No case has been passed upon by the Supreme Court of the United States, involving the question of preferential debts and priorities, in which that Court has not rested its decision on the doctrine announced in the case of Fosdick v. Schall. The case has been quoted very extensively and approvingly where ever it has been referred to. Not in a single instance has this case been overruled, criticised or modified or suggested as obiter dicta.

The whole doctrine of priorities as shown by the adjudications by the Courts is of modern origin, and it is based solely upon equitable considerations and reason, and its distinctions, application and discrimination rests in a large degree upon the sound judicial discretion of the Courts of equity, applying and having due regard to all the details and circum-

stances and the facts involved in each particular case. It may be true that some contrariety of judicial opinion and application of the principle of this doctrine rests solely on equitable considerations, largely deduced from judicial discretion as would be inevitable. It is impossible to lay down any absolute, positive, inflexible rule for the application of the doctrine. Each case must be examined and determined upon its own special facts and equities. Each case will be found to present its own peculiarities which must in some degree influence the Courts of equity in their final decisions.

In Lackawanna Iron & Coal Co. v. Farmer's Loan & Trust Co., 176 U. S. 298, 44 L. Ed., 475, and in Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. Ed., 457, after reviewing these cases the Supreme Court said: "The decision in each case has been more or less controlled by its special facts."

One holding a mortgage upon mining property has the same right to demand and expect of the Court respect for his vested and contracted priority as the holder of a mortgage on a city lot or farm. When the Court appoints a receiver of property on a mortgage foreclosure, and orders a sale of the property which is regular under the law and the rules of the Court, it has no color of legal or equitable right after said sale has been made, reported to the Court by the Master making the sale and the confirmation thereof had, to order a re-sale of the same to satisfy a judgment procured subsequently by the Intervener and Appellee in this suit. If there

is any authority in law for a Court of equity so to do and act, Appellants have been unable to find such a case in the books.

The rights of these Appellants in the mines property adjudicated under their Bill of Foreclosure and sold by the terms of the decree and order of sale directing the sale of the property on the 29th day of June, 1912, and the confirmation of the same prior to the institution of suit for personal damages and judgment in said suit in favor of the Appellee deprives the Court of any authority in law or equity to set aside the former decree and sale thereunder. That decree was final and should not be questioned or altered by the Court below.

Mills v. Hoag, 7 Paige 18; Beebe v. Russell, 60 U. S., 19 How. 285 (15:668); Ray v. Law, 7 U. S., 3 Cranch 179 (2:404); Thompson v. Dean, 74 U. S., 7 Wall, 342 (19:94); R. R. Co. v. Bradleys, 74 U. S., 7 Wall, 575 (19:274); Green v. Fisk, 103 N. S. 518 (26:486); Grant v. Phoenix Ins. Co., 106 U. S., 429 (27:237); Bostwick v. Brinkerhoff, 106 U. S., 3 (27:73); R. R. Co. v. Express Co., 108 U. S. 24 (27:638); Winthrop Iron Co. v. Meeker, 109 U. S. 108 (27:989).

The question then is: Did the purchaser at the sale under the decree of April 30, 1912, and the order of sale thereunder, take the mines property at said sale free from all liens, claims and incumbrances? Appellants answer: That under the terms of said decree and the order of sale it purchased and took the property as such purchaser free and clear from

all claims against the Receiver arising out of the operation of the mines; that the Court ordered no condition, nor imposed any upon the purchaser under the decree and order of sale but what he fully complied with. That the purchaser at such sale can only be held liable according to its terms. It follows then that the purchaser at said sale can not be held liable for payment of a judgment asserted by Appellee, and Intervener, herein, as he purchased and took possession upon the date of purchase under the statute of the United States and the statute of the State of Oregon in relation to judicial sales and purchases thereat as hereto referred to and set out in this brief.

ROBERT M. BETTS, Receiver, testified in the intervention proceedings. He was interrogated by C. E. S. Wood, who purchased the mines property at the Master's sale.

QUESTIONS BY MR. WOOD:

Q. Mr. Betts, there has been some question herein as to properties that were acquired by the Cornucopia Mines Company, deeds to which were executed by you as Receiver subsequent to the sale to me as Trustee at Baker City—I forget the date myself. I wish you would take up the history of those matters and make report of it now in Court, exhibiting such deeds and documents as you have.

A. The matter is simply this: The company has never had sufficient power to operate the mine and the mill and it had been planned on the part of the receivership to extend the present pipe line farther

down the creek in order to obtain a higher head, and thereby increase the power; and, as this was necessary for the benefit of the mine, I made application to the State Engineer and offered to buy a piece of ground from Alexander McDonald.

Q. State when you made this application, if you made the negotiations.

A. The application was made on the 3rd day of February, 1912.

A. Well, I will have to amplify that a little bit by saying that we already owned the water right and we merely took the same water and carried it under pressure farther down the creek, but that the State law required that we ask for a permit, so I asked for a permit for 9 1-3 cubic feet per second, the power to be applied for mining purposes.

Q. You asked for that as Receiver?

A. I asked for that as Receiver.

Q. And the water you already were using, already had the water rights?

A. We already had the water rights, since 1895.

Q. And this was not an amplification of that at all?

A. Yes.

Q. Was that an application for a new water right?

A. No, sir.

Q. What was it?

A. It was an application to carry this water farther down the creek.

Q. For what purpose?

A. For the purpose of generating more power.

Q. Getting greater head?

A. Getting a greater head.

A. I purchased five acres of ground from Alexander McDonald on which to locate the power house.

(Trans. Rec., pages 181, 182 and 183.)

COURT: Have you made a report in this case?

A. Yes, your honor.

Q. Just state who furnished the money and produce the voucher showing it.

A. Well, the money was furnished by the Receiver and the Leesee. The bank account is carried as Robert M. Betts, Receiver.

Q. Where did the funds originate? Where did they come from? From the earnings of the mine?

A. Yes, sir.

(Trans. Rec., page 184.)

A. The consideration was $250.

MR. JOHNS: I mean the consideration expressed in the deed.

A. Two hundred and fifty dollars, and it was filed for record August 16, 1912, in Baker County.

(Transcript Rec., page 187.)

Consideration $250. Filed for record the 7th day of August, 1912, Book 77, page 183.

COURT: Do I understand this covers practically the same land as was covered by the prior deed?

A. It covers the same ground. Yes, sir; there was no more money consideration. That is, we didn't pay him any more money.

Q. Mr. Betts, do I understand that you put the same number of acres in this later deed that has been

read into the record as was included in the former?

A. Yes, sir.

Q. You simply extended it in a different form and shape?

A. Yes, sir; that is all, we made it more rectangular.

COURT: Well, the two deeds together, then, would make more than five acres that you got.

A. Well, they would.

(Trans. Rec., page 188.)

Q. Go on, Mr. Betts.

A. I supposed that the water right in this deeded land from McDonald went with the property covered by the mortgage. That was my interpretation of the mortgage, but the water right in Salem stood on record as Robert M. Betts, Receiver, so I wrote to the State Engineer and asked him to change that to the name of the Cornucopia Mines Company of New York—the new owners. In reply he stated that a request like that was not sufficient, that it had to be something to be written into the records, so he asked for a deed to be made out to be placed on file—the deed, which is this deed.

Q. That is what is known as the Receiver's deed, then, is it?

A. Yes, it was made out and sent to Salem for record, and that is all there was of the matter.

COURT: Give the date of the deed and read the description. This deed is from you?

A. From me to Cornucopia Mines Company of New York. The date of the deed is November 20,

1912, from Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, to the Cornucopia Mines Company of New York.

(Trans. Rec., pages 189 and 190.)

COURT: What were you going to say?

A. I was going to say, your honor, so that this won't be misunderstood, when I talked with McDonald about getting this new power site he wanted us to give up the old power site when we were through with it, as it was good land and he could use it for agricultural purposes, so I agreed with him that if he would take down the old power house I could give him back the land; but we decided that it was necessary to keep this old power house and that I would pay him $250 additional. Then when I finally gave him the balance, we decided to keep the power house, I gave him $300 on account of the expense we had put him to in tearing up his field and putting this pipe line in, and getting ready for the pipe line. So altogether he was paid $550.

(Trans. Rec., pages 197 and 198.)

COURT: Does this cover the same ground again?

A. Yes.

COURT: The same five acres?

A. Yes, sir.

COURT: You have three deeds?

A. Three deeds covering practically the same ground.

(Trans. Rec., page 199.)

MR. JOHNS: He made it himself as Receiver.

A. Not as Receiver; no, sir.

COURT: In what capacity?

A. Cornucopia Mines Company of New York.

(Trans. of Rec., page 202.)

COURT: Well, you got an additional water right?

A. No, that is not an additional.

Q. This is an amendment of the permit No. 1060?

A. This doesn't take any more water. It merely changes the point of diversion.

Q. Do you know about what distance the change was made—that was made by that change?

A. About a mile—a mile in length.

Q. It gave you that much more power?

A. It gave no more power whatever.

Q. Then why did you do it?

A. Under the laws the old holders of water rights can retain their old water rights, but any subsequent applications come under the new law. The flume was held under the old law, and in making the application for this permit to carry the water on down in a pressure pipe, to get more head, we mentioned the point of diversion as the flume, which was the pen stock for the pipe line. The flume itself ran up the creek about a mile. Then about six months ago I discovered that we held part of the system under the old water right; that is, the flume part under the old water right, and the other part, the pipe line, under the new law. So I amended the point of diversion to read at the head of the flume instead of at the foot of the flume.

Q. Why was this deed executed to the Cornucopia Mines Company of New York?

A. Merely to satisfy the State Engineer, to get that on the record.

Q. You did it to satisfy the State Engineer?

A. Yes, sir.

Q. That is the only reason?

A. That was the only reason.

Q. How does it happen that it was executed on the identical day that the deed was made by Col. Wood to the Cornucopia Mines Company of New York?

A. I don't know that it was.

MR. CALLAHAN: Just wait a moment; I want to get that into the record, if it is correct.

A. I don't know that it was.

Q. If your deed was executed on the 20th of November, 1912, to the Cornucopia Mines Co. of New York, and Col. Wood's deed on the 20th of November, 1912, it was the same day, was it not?

A. Yes, sir.

Q. Now, can you give any reason why it was done on these particular dates?

A. Mr. Johns, I never knew the date of Col. Wood's deed. I didn't know until now.

(Trans. of Rec., pages 204, 205 and 206.)

On page 207 of the Transcript of Record Mr. Johns makes the statement that the Master's deed to Col. Wood was executed on November 20, 1912; "as a matter of fact, and the record, this is not true. Ed. Rand, the Master, made his deed as such Master to C. E. S. Wood, as Trustee, on October 8, 1912,

and the same was recorded in Volume 77, page 384, in Books of Deeds in the office of the Clerk and Recorder of Baker County, Oregon, and Wood's deed as Trustee to the Cornucopia Mines Company of New York, the new corporation, was recorded in Book of Deeds of Baker County, Oregon, in the office of the Clerk and Recorder thereof, on October 10, 1912, in Volume 77, page 390."

Q. Did you ever apply to this Court, or did you ever obtain an order from this Court, to construct that power house on the McDonald land?

A. No, sir; that was not constructed by the Receiver.

Q. It was done while you were Receiver, wasn't it?

A. Yes, I was lessee at the same time.

COURT: You didn't construct that as lessee.

A. Yes, sir; that is, I constructed it while I had a lease on it.

Q. Do you mean to say, Mr. Betts, that there is any provision in your lease requiring you to construct a power house on this land, or the McDonald land, at a cost of $20,000, to use for the benefit of the company?

A. Now, just wait a minute, Mr. Johns, just read the questions.

A. I would like to state that position on that—

COURT: Go on, state your position.

MR. JOHNS: Just a moment, the witness can answer the question and then make any explanation he wants to.

A. All right.

(Question read.)

A. No, there is no provision in the lease.

COURT: What explanation do you want to make?

A. I was going to say that the lease was given me primarily so that I could go ahead and carry on this work with greater expedition, and so that my hands would not be tied. All the men connected with the concern live in New York and they had no head office, and the lease was given to me more with that in view, so that I could go ahead with a free hand.

COURT: Then, you were operating in fact for the lessor?

A. For the company, yes.

COURT: Well, was it the New York company or the Oregon company?

A. No, the New York company. It wasn't a company at that time at all, it was a group.

COURT: And in this case, although you were lessee of these mines by written contract, you were virtually the manager for the New York company.

A. Well, there was no—

COURT: I am asking you if that was a fact.

A. Yes, sir; there wasn't any company.

COURT: But you were the manager?

A. For the men in the East.

COURT: I mean for the company that was to be organized.

A. Yes.

COURT: That is, for the promoters of the company.

A. Yes, sir.

COURT: That was your real position?

A. Yes, sir.

Q. And that company was afterwards organized as the Cornucopia Mines Company of New York?

A. Yes, sir.

Q. Now, Mr. Betts, have you any funds in your possession as Receiver.

A. No, sir.

COURT: You haven't made any report, have you, as to the funds paid into the Court to comply with the sale?

MR. CALLAHAN: No, we are expecting Mr. Betts to make that report now. He hasn't any money; I supposed that was understood.

COURT: Well, there was certain funds to be paid into the Court to pay the costs, until the costs were satisfied and until the claim against the estate which was prior to the mortgage was satisfied under the terms of the sale, and I think a report ought to be made of that to inform the Court what has been done.

MR. CALLAHAN: Oh, yes, I will make that report; but Col. Wood paid the costs and took care of that.

COURT: It ought to have gone through court proceedings so the Court would know.

MR. CALLAHAN: I suppose he will make that report. He attended to that part of it. I wasn't present.

COURT: Has the Master filed his report and does it not contain that information?

MR. CALLAHAN: I don't know that it does in detail, but some how it indicates that it was paid for. Col. Wood has paid it in green backs. I know the Clerk's costs were paid, because he returned me some funds, $10 or $12, or such a matter, of the surplus by his check. He did that very recently, within the last few months.

(Trans. of Rec., pages 209, 210, 211 and 212.)

Q. Mr. Betts, while you were in charge of this property as Receiver, what improvements, if any, did you make on that property?

A. Very few as Receiver.

Q. Well, did you make any at all.

A. Not that I remember of now; no, sir.

Q. Didn't you construct a cyanide plant on it?

A. Not as Receiver; no, sir.

Q. Didn't you do it otherwise?

A. I put in other money; yes, sir.

Q. How much did that cyanide plant cost?

A. About $70,00 or $80,000.

Q. And what other betterments and improvements did you put on this property during the time you were Receiver?

A. Merely a power house.

Q. What other improvements?

A. None, that I remember now as being of any magnitude.

Q. And when did you first commence the making of these improvements after you were appointed?

A. Not until the spring, the actual work. The improvements were all contemplated and the plans made for carrying on the work in October, 1911.

Q. Do you know about the amount of your expenditures that was made from January, 1912, to the 1st of August, 1912?

A. The total amount you mean.

Q. Yes.

A. I don't know off hand.

Q. Here is a recapitulation of it.

A. $71,681.27.

Q. What was the amount of your receipts during that period?

A. $781.81 less than that.

(Trans. of Rec., pages 214 and 215.)

Q. Now, you say this money that was paid to McDonald, you paid to him as Receiver?

A. Yes, sir.

Q. Examine these vouchers. What do those vouchers show?

A. You mean the heading?

Q. Yes.

A. It is stamped "Robert M. Betts, lessee." No, sir; it is not wrong, the Court said I could act in both capacities, as lessee and receiver.

Q. Well, you say you paid this money as receiver.

A. I will show you right here, Mr. Johns—I took the lessee's money.

(Trans. of Rec., page 218.)

MR. JOHNS: Yes, they are vouchers, your honor.

A. You seem to have the impression that we are trying to do something underhanded. I would like to say to you that we were not. Everything has been open and above board as far as possible.

Q. Well, Mr. Betts, we simply want to get these facts in the record, then we will argue the case by-and-by.

A. Well, I would like to show right now that they were carried as one and the same account. When the receivership started $1,224.90 was the ballance I had in the bank and I transferred that to Robert M. Betts, Receiver, and carried it on through the months, until in the end there was a deficit; and because of that deficit I gave the Bishers $600 of money out of the other funds, because this fund was short.

COURT: You say you gave him $600?

A. I gave him $600.

Q. On what account?

A. To help Johnny in the hospital.

Q. After he was hurt, to apply on this judgment?

A. No, sir. No, because there wasn't a thought of a suit. They always claimed it was his own fault,

and there was no suggestion of a suit—nothing like that; and the matter was considered closed, and along in October Mrs. Bisher came up to the mine and she said: "Now, you have said that you would help me in any way you could." She said: "The time has come. John (her husband) has come to Portland."

A. "The lawyers want Johnny to bring suit," and she said, "I don't want them to bring suit, because, first, I feel it is not fair to you, and, second, I don't think we can get any money."

A. Now, as Receiver, this report was all filed, and I supposed the matter was all cleared up, your honor, before any suit was brought, and I told Mrs. Bisher what I would do, and she broke down and cried, and said that was more than she could expect, and she would telegraph John. And the next I knew I was served with papers in the suit.

A. I would like to have things thoroughly understood here. It seems as if I am under fire here as doing something.

(Trans. of Rec., pages 218, 219, 220 and 221.)

Q. Now, Mr. Betts, on what particular piece of land is this power site constructed? Just point out in the deed here.

A. It is constructed on the ground bought from McDonald.

Q. Upon what lands is the cyanide plant constructed?

A. On the old ground, the ground covered by the mortgage.

Q. Can you point out the land, Mr. Betts, would you know?

A. No, this is the same place. The name of the claim is the Phoenix claim.

Q. Now, this power plant was constructed on this land. Where did you get the machinery for that?

A. In San Francisco—San Francisco and New York.

Q. And it was shipped up and put upon this ground during this time?

A. Well, it wasn't erected until the following January, because the machinery was late.

Q. What January?

A. January, 1913.

Q. Now, when this water filing, or permit rather, was obtained from the office of the State Engineer, was their a ditch or flume line then extended?

A. Yes, it was all built. The flume had been there for years.

Q. And you rebuilt it?

A. No, you see, Mr. Johns, the flume came down about a mile down the creek.

(Trans. of Rec., pages 227 and 288.)

QUESTIONS BY MR. CALLAHAN, REDIRECT EXAMINATION OF MR. BETTS.

Q. Now, just one more question, Mr. Betts, to make it clear to the Court. You have testified here in relation to certain permanent improvements that were made at various times, which were contem-

plated before the receivership, and some carried on during the receivership and some portions carried on after the receivership.

A. Yes.

Q. Now tell the Court where you got the money to make these expenditures and to pay for those improvements and the machinery specifically.

A. It was sent to me from Mr. Lawrence, and together aggregated up to the 1st of September some $83,000.

COURT: What year.

A. 1912.

COURT: That was sent to you prior to the receivership and during the receivership?

A. Yes, sir; prior to the receivership and during the receivership, and was deposited in my name as lessee in Spokane, Washington, in a Spokane bank.

Q. You have the checks there?

A. Not all of them. I have part of them.

Q. This fund was checked out for this specific work and was deposited in a Spokane bank?

A. Yes.

Q. Were you in the habit of carrying your account under the receivership and as lessee of the mine?

A. In the Citizens Bank of Baker, Oregon; I did my best, your honor, to keep these separate and straight.

COURT: I have no doubt of that.

A. I thought the matter had been merely cleared

up and that my receivership was awaiting its course on the docket to be discharged.

COURT: Well, it would have been discharged had it not been for this judgment against you as Receiver.

MR. JOHNS: Now, I want to see if we can agree upon the date that this deed was made.

A. If that deed was the 7th of October it was prior to bring the suit.

MR. CALLAHAN: Write it in as a matter of testimony.

MR. JOHNS: All right.

It appears from the records that Ed. Rand, Special Master, in this suit, executed his deed to C. E. S. Wood, Trustee, of the property mentioned and described in the trust deed and mortgage of date October 7, 1912; that the deed was recorded on the 10th day of October, 1912, in Book 77, Records of Deeds of Baker County, Oregon, on page 384 et seq.

ROBERT M. BETTS RESUMED THE STAND AND WAS EXAMINED BY THE COURT.

Q. Mr. Betts, I want to ask you another question. Have you any property in your possession, or has any property come into your possession, aside from what has been transferred by these deeds in question, first by the deed in the foreclosure sale and the deed you have given as Receiver to the New York Company?

A. No, sir. No, nothing; you mean real estate? Have I bought any property?

Q. Well, has any property come into your hands as Receiver?

A. No.

Q. That has not been disposed of?

A. No.

(Trans. of Rec., pages 230, 231 and 232.)

MASTER'S SALE.

The sale, under the decree in this case of April 30, 1912, was made by the Master under that decree and order of sale, and the purchaser thereat, C. E. S. Wood, as Trustee, took the property free from all claims except as therein provided, that he pay a sufficient amount in cash to cover the costs, etc., outside the first mortgage bonds given as the purchase price at the Master's sale.

A purchaser at such a judicial sale can only be held according to its terms. There was no provision in the sale to meet any existing judgments or liens, as, at the time of sale, and prior thereto, there were no judgments, liens or liability against the property.

Hicks v. International & G. N. R. Co., 62 Tex. 41; Beach, receivers, Section 735.

A purchaser at a judicial sale is not liable for the payment of liens as judgments independent of the decree and order of the Court.

Bisher, the Appellee and Intervener herein, did not make the Cornucopia Mines Company of Oregon, C. E. S. Wood, Trustee, or the Cornucopia

Mines Company of New York, parties defendants in his damage suit in which he recovered judgment which he now seeks to satisfy out of the mines company's property. No notice or service of summons or process was served upon any of the foregoing parties in Bisher's damage suit; no suit was pending at the time of sale by Bisher, or any other plaintiff; in fact, the facts upon which Bisher recovered his judgment and the allegations in his complaint did not take place until thirty days subsequent to the sale of the property under the foreclosure proceeding, and the decree of April 30, 1912; there being no suit, judgment or lien against the property at the date of sale and no provision to meet contingent claims or judgments against the property; the purchaser at the Master's sale on June 29, 1912, was not put upon notice. If Bisher, the Appellee, had a prior lien by way of judgment for damages against the Receiver of the Cornucopia Mines Company of Oregon and its property, which was subsequent to the making and execution of the mortgage on the mines, we assert that his lien or judgment would be a junior and inferior lien; and the plaintiff in the foreclosure suit could have made him a party to the foreclosure, and determined the character and legal nature of his lien, if any. If the decree and sale under the foreclosure was set aside and vacated, under the allegations in the Bisher complaint in his damage suit, still Bisher would have no valid lien against the property, as there was an existing valid mortgage, duly executed and recorded, against the mines at the

time and the dates he alleges in his complaint that his action, or the facts alleged, accrued, upon which he seeks to recover.

On this question of first mortgage liens we refer: Kendall v. McFarland, 4 Ore., p. 296; U. S. Investment Corporation v. Portland Hospital, 40 Ore., 523; Inverarity v. Stowell et al., 10 ore., 261; Laurent v. Lanning, 32 Ore., p. 11 and 18; Farmers Loan & Trust co. v. Ore. Pac. Ry. Co., 31 Ore. 237.

Under the Judiciary Act of 1789, the Courts of the United States have uniformly adopted the principles of State jurisprudence on the subject of judgment liens; Rankin v. Scott, 25 U. S. 12 (Wheat.), 6 L. Ed., 592.

A prior recorded mortgage is entitled to satisfaction out of the thing it is a mortgage upon, against all subsequent mortgages, liens and judgments.

The judgment set forth in Intervener's petition and application to intervene, does not give Appellee a prior lien in equity, or preference equal to the first mortgage line of the mortgage bond holders. Miltenberger v. Logansport C. & S. W. R. Co., 106 U. S. 286, 27 L. Ed. 117; Union Trust Co. v. Ill. Midland R. Co., 117 U. S. 434, 29 L. Ed. 963; Porter v. Pittsburg B. S. Co., 120 U. S. 649, 30 L. Ed. 860; Kneeland v. American L. & T. Co., 136 U. S., 89, 34 L. Ed. 379; Morgan, Louisiana & Tex. R. & S. Co. v. Texas Central R. Co., 137 U. S. 171, 34 L. Ed. 625.

IN CONCLUSION Appellants say that the Cornucopia Mines Company of Oregon was not a

party defendant in the law case of Bisher against Betts, as Receiver, wherein he recovered judgment; Bisher, Appellee, was not a party to the equity suit of the Hamilton Trust Company v. the Cornucopia Mines Company of Oregon, et al., in the foreclosure proceeding; this latter foreclosure was fully determined and adjudicated by the U. S. District Court for the District of Oregon, and its decree given April 30, 1912, and the property foreclosed thereunder and sold by the Master of said Court appointed for that purpose under the decree on the 29th day of June, 1912, to C. E. S. Wood, as trustee, nearly five months before Bisher, the Appellee, commenced his suit and served summons upon Betts, as Receiver and Defendant.

The Hamilton Trust Co., Appellant, commenced its suit in foreclosure against the Cornucopia Mines Company of Oregon, Laubenheimar & Holmes, as respondents, on December 5, 1911; the injury complained of by Bisher, Appellee, in his petition in intervention herein, is alleged to have occurred on July 28, 1910; so we submit to the Court that their existed no reason in fact, or in law, why Bisher should have been made a party to the Hamilton Trust Company's suit in foreclosure, as his suit, or judgment, or alleged lien, did not exist at that time.

For illustration, suppose Bisher, the Appellee, had a judgment prior to the institution of the Hamilton Trust Company's suit in foreclosure, and the Appellee had been made a party in such suit, his lien, we repeat again, would have been decreed in the fore-

closure action as junior and inferior to the first and paramount mortgage lien of the Hamilton Trust Co.

Respectfully submitted,

EMMETT CALLAHAN and

WOOD, MONTAGUE & HUNT,

Attorneys for Appellants.

The confirmation of a sale adjudged that the purchaser has completed his bid. Thereafter the sale can be set aside for fraud, accident or mistake.
Files v. Brown, 124 Fed. 133, 138-139.